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No. 03-1601

In the
Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, DELAWARE, OHIO, OREGON, TEXAS, UTAH, VERMONT, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, as held below but contrary to decisions of the Third and Seventh Circuits, the limits on state and local zoning and land-use authority established by Section 332(c)(7)(B) of the Communications Act may be enforced through an action for damages and attorney's fees under 42 U.S.C. §§1983 and 1988. *See* Pet. at i.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

REASONS FOR GRANTING THE WRIT 3

I. The Court Should Grant Certiorari To Resolve the Clear Circuit Split Concerning the Propriety of Enforcing the Communications Act Through Section 1983 and To Clarify the Meaning and Scope of the *Sea Clammers* Decision. 3

II. The Ninth Circuit's Decision Is Inconsistent With *Sea Clammers*, With This Court's Decisions in Related Contexts, and With Common Sense 10

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Abrams v. City of Rancho Palos Verdes, 354 F.3d 1094 (9th Cir. 2004) 4

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 7

AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001) 4, 18

Blessing v. Freestone, 520 U.S. 329 (1997) 3, 8, 12, 13

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598 (2001) 18

Cellular Tele. Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) 17

City of Leeds v. Town of Moody, 319 So. 2d 242 (Ala. 1975) 1

Edwards v. Balisok, 520 U.S. 641 (1997) 5

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 7

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 3

Heck v. Humphrey, 512 U.S. 477 (1994) 5, 14

Hensley v. Eckerhart, 461 U.S. 424 (1983) 18

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 18

Maine v. Thiboutot, 448 U.S. 1 (1980) 4

MCI Telecomm. Corp. v. Southern New England Tele. Co., 27 F. Supp. 2d 326 (D. Conn. 1998) 2

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) ..... passim

Muhammad v. Close, 124 S. Ct. 1303 (2004) 5

National Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002) 16, 17

New Par v. City of Saginaw, 301 F.3d 390 (6th Cir. 2002) 16, 17

Nextel Partners Inc. v. Kingston Twp., 286 F.3d 687 (3d Cir. 2002) 4, 7, 8

Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp., 181 F.3d 403 (3d Cir. 1999) 17

Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002) 16, 17, 19

Preiser v. Rodriguez, 411 U.S. 475 (1973) ..... passim

PrimeCo Personal Comms. Ltd. P'ship v. City of Mequon, 352 F.3d 1147 (7th Cir. 2003) 4, 18

Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305 (D.N.M. 2002) 2

Smith v. Robinson, 468 U.S. 992 (1984) ..... passim

Spencer v. Kemna, 523 U.S. 1 (1998) 15

Sprint Tele. PCS, L.P. v. County of San Diego, 311 F. Supp. 2d 898 (S.D. Cal. 2004) 2

Verizon Maryland Inc. v. RCN Telecom Servs., Inc., 232 F. Supp. 2d 539 (D. Md. 2002) 2

Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) 12, 13

Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987) 8, 12, 13

Statutes

28 U.S.C. §2254 ..... 5, 14, 15

42 U.S.C. §1983 ..... passim

42 U.S.C. §1988 ..... passim

47 U.S.C. §252 2

47 U.S.C. §253 2

47 U.S.C. §332(c)(7) ..... passim

Other Authorities

C. Jacques & J. Beerman, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735 (2001) 1, 13, 15, 17

INTEREST OF AMICI CURIAE

In the decision below, the Ninth Circuit held, in contrast with the Third and Seventh Circuits, that the remedial scheme established by 47 U.S.C. §332(c)(7), which addresses the siting and construction of wireless communication facilities, is not sufficiently "comprehensive" within the meaning of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to preclude enforcement through the generic cause of action created by 42 U.S.C. §1983. The amici States' interests in this case are threefold.

First, the Communications Act provisions at issue apply by their terms not just to municipalities (like petitioner here) but also to State governments and their officers. *See* C. Jacques & J. Beerman, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735, 751-52 (2001) ("The [Telecommunications Act] repeatedly refers to 'State or local' governments, thus explicitly placing obligations on states."). Of principal importance here, §332(c)(7) prescribes an express private cause of action against any "*State* or local government or any instrumentality thereof." *Id.* §332(c)(7)(B)(v) (emphasis added). Accordingly, even aside from the symbiotic relationship that exists generally between cities and States, *see City of Leeds v. Town of Moody*, 319 So. 2d 242, 246 (Ala. 1975) ("Municipalities are mere instrumentalities of the state possessing only such powers as may have been delegated to them by the legislature."), §332's plain text expressly brings States and their officers – as such – within its ambit. And while it may typically be the case (as it is here) that local governments deal with the placement and construction issues to which §332(c)(7) applies, that is not necessarily – nor will it always be – the case.

Second, §332(c)(7) does not exist in a vacuum. Rather, as the petition correctly points out, §332(c)(7) "forms part of the Communications Act's comprehensive regulatory

scheme." Pet. at 21. As they have done when addressing §332(c)(7), lower courts have disagreed whether other provisions of the Act – provisions that directly target States and their officers – entail sufficiently "comprehensive" remedial schemes to preclude resort to §1983's general terms under *Sea Clammers*. With respect to 47 U.S.C. §252, which provides a cause of action against state public service commissioners in connection with the negotiation and enforcement of interconnection agreements, compare *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 557 (D. Md. 2002) (rejecting §1983 suit under *Sea Clammers*), with *MCI Telecomm. Corp. v. Southern New England Tele. Co.*, 27 F. Supp. 2d 326, 334 (D. Conn. 1998) (permitting §1983 suit). With respect to 47 U.S.C. §253, which deals with telecommunications providers' uses of public rights-of-way, compare *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305, 1315 (D.N.M. 2002) (rejecting §1983 suit under *Sea Clammers*), with *Sprint Tele. PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 913-15 (S.D. Cal. 2004) (permitting §1983 suit). The amici States are concerned that the Ninth Circuit's decision below that §332(c)(7)'s remedial scheme is insufficiently comprehensive to preclude resort to §1983 will have ripple effects in other provisions of the Communications Act and thus expose state officers and employees to unexpected personal §1983 liability.

Third, and perhaps most importantly, the amici States, whose officers and employees are perhaps the most frequent defendants in suits brought under §1983, have a keen interest in preventing the unwarranted extension of §1983 into areas governed by other, more specific remedial regimes. The *Sea Clammers* rule – like, amici will show, the rule of *Preiser v. Rodriguez*, 411 U.S. 475 (1973) – serves the important function of precluding plaintiffs from invoking §1983's open-ended remedial regime where Congress has exercised its prerogative to establish a more specific, and more limited, cause of action. Just as the States have intervened to defend and preserve the *Sea Clammers* rule before, *see, e.g.*, Br. of Amici Curiae States of Illinois et al. at 16-22, *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (No. 01-679); Br. of Amici Curiae States of Illinois et al. at 19-25, *Blessing v. Freestone*, 520 U.S. 329 (1997) (No. 95-1441), they do so here.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari To Resolve the Clear Circuit Split Concerning the Propriety of Enforcing the Communications Act Through Section 1983 and To Clarify the Meaning and Scope of the *Sea Clammers* Decision.

Section 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. §332(c)(7), prescribes an express private cause of action to redress violations of the Act's wireless communications equipment-siting provisions:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis ....

Id. §332(c)(7)(B)(v).

1. As the petition demonstrates, the courts of appeals (and the district courts, for that matter) are divided over the question whether the private cause of action detailed in §332(c)(7) is sufficiently "comprehensive" within the meaning of this Court's decision in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), to preclude resort to the generic cause of action set forth in 42 U.S.C. §1983. *See* Pet. at 12-20. The Third and Seventh Circuits say yes; the Ninth and Eleventh Circuits (the latter in a now-vacated opinion) say no. *Compare Nextel Partners Inc. v. Kingston Twp.*, 286 F.3d

687 (3d Cir. 2002), *and PrimeCo Personal Comms. Ltd. P'ship v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003), *with Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004) (Pet. App. 1a-12a), and *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001). The circuit split has been openly acknowledged by the relevant players: In the decision below, the Ninth Circuit expressly rejected the Third Circuit's "reasoning [as] flawed in several respects." Pet. App. 8a. The Third Circuit, for its part, had earlier "respectfully disagree[d] with the reasoning" of the Eleventh Circuit. *Nextel Partners*, 286 F.3d at 695.

What is more, the divide in the circuits is not just about results, with some permitting Communications-Act plaintiffs to seek damages and fees under §1983 and others refusing. Rather, the divide runs deep, and reflects a fundamental disagreement about the meaning of this Court's decision in *Sea Clammers* and – deeper still – about the operation of §1983 itself.

Section 1983's language, of course, is broad. It provides that any person who, acting under the color of state law, deprives another of "his rights, privileges, or immunities secured by the Constitution and laws," shall be liable "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. Particularly relevant here, §1983 permits suits alleging deprivations of rights secured by the "laws" of the United States. In 1980, this Court held that §1983's "and laws" clause authorizes suits to redress violations by state officials of rights created by federal statutes. *See Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

This Court has also made clear, though, that §1983's broad language cannot be read literally, else it would swallow up – and displace – other, more specific remedial schemes. Perhaps most notable in this respect have been this Court's decisions concerning the "intersection," or "overlap," of §1983 and the federal habeas corpus statute,

28 U.S.C. §2254. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 124 S. Ct. 1303 (2004). In the first in that line of cases, *Preiser v. Rodriguez*, this Court faced §1983 suits by state prisoners seeking the restoration of good-time credits they claimed had been unconstitutionally revoked. The inmates had sued under §1983 to avoid having to exhaust their state remedies, as the habeas statute expressly requires, *see* 28 U.S.C. §2254(b). "The question before us," this Court said, "is whether state prisoners seeking such redress may obtain equitable relief under [§1983], even though the federal habeas corpus statute, 28 U.S.C. §2254, clearly provides a specific federal remedy." 411 U.S. at 477. In answering that question in the negative, the Court stressed that "[t]he broad language of §1983 is not conclusive ...." *Id.* at 489. Emphasizing that "[t]he [§1983] statute is a general one," the Court held that, "despite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute ... must be understood to be the exclusive remedy in a situation like this where it so clearly applies." *Id.*

This case presents a similar issue, albeit in a different context. Under what circumstances is §1983 available to a plaintiff claiming that a state or local official deprived him of a right created by a federal statute? And more specifically, when may a plaintiff resort to §1983's generic cause of action rather than utilize the specific cause of action – and accompanying procedures and remedies – available to him under the statute he seeks to enforce? Just a year after its decision in *Thiboutot* recognizing that §1983 authorizes suits for violations of federal statutes, this Court in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, recognized an important exception to the application of §1983 to statutory violations. Specifically, the Court held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983." *Id.* at 20. Accordingly, the *Sea*

Clammers Court emphasized, when "'a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983.'" *Id.* (citation omitted).

2. The division in the courts of appeals that underlies the current petition reflects a fundamental disagreement concerning what makes a statute's enforcement scheme "comprehensive" within the meaning of *Sea Clammers*. For its part, the Ninth Circuit has adopted what we, for ease of analysis, will call a "more is better" approach to *Sea Clammers*' comprehensiveness criterion; it views a comprehensive statutory scheme as one that is extensive, and specifically one that provides plaintiffs with a host of remedial options. In finding §332(c)(7)'s remedial scheme not to be comprehensive under *Sea Clammers*, the Ninth Circuit emphasized its view that the section's "[s]hortening [of] the statute of limitations to thirty days imposes a burden on an aggrieved plaintiff, not a benefit," and that "[t]he only benefit to an aggrieved plaintiff" under the section is expedited judicial review. Pet. App. 8a; *see also id.* at 9a (referring to §332(c)(7) as "limiting the plaintiff's remedies"). Furthermore, and consistent with its understanding that a comprehensive remedial scheme should maximize a plaintiff's remedial options, the Ninth Circuit reasoned from the absence in §332(c)(7) of any provision for monetary damages *not* that damages are unavailable in suits seeking to enforce §332(c)(7), but instead that damages (and fees) may be had through resort to §1983: "While one may argue that the lack of any damages [remedy] in the [Telecommunications Act] is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a. Thus, in the Ninth Circuit's view, the fact that a statute limits a plaintiff's remedies – whether expressly (as by imposing a short limitations period) or implicitly (as by omitting an express damages provision) – in and of

itself indicates that the statute's scheme is not comprehensive under *Sea Clammers*, and that §1983 thus remains available.

As its decision in *Nextel Partners* demonstrates, the Third Circuit has taken a fundamentally different view – which we will call the "internal coherence" view – of *Sea Clammers*' comprehensiveness criterion. In finding §332(c)(7)'s remedial scheme to be sufficiently comprehensive to preclude resort to §1983, the Third Circuit acknowledged that the scheme "is not complicated." 286 F.3d at 694. But, the court emphasized, it is "comprehensive in the relevant sense," namely, in that it "provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* Specifically, the Third Circuit emphasized that while §332(c)(7) "requires that [an] action be filed within a very short period – 30 days – after an adverse decision or failure to act," it also "correspondingly requires the court to 'hear and decide such action on an expedited basis.'" *Id.* at 695. Section 332's "streamlined review," the court said, "may work to the benefit of plaintiffs and defendants in different ways." *Id.* The Third Circuit also "f[ound] it important" to its determination of comprehensiveness that the Communications Act, unlike §1983's counterpart §1988, "makes no provision for attorney's fees," and thus under the prevailing "American rule" does not permit fee-shifting. *Id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994), and *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-62 (1975)).

Accordingly, whereas the Ninth Circuit viewed §332(c)(7)'s "burden[s]" and "limit[ations]" on a plaintiff's right of recovery as evidence that the statute's remedial scheme is not comprehensive, the Third Circuit, working from the same premises, drew precisely the opposite conclusion. For the Third Circuit, the issue was not simply whether §1983 is a better deal for plaintiffs than the Communications Act. Rather, the Third Circuit looked to whether the remedial regime established by

§332(c)(7) is self-contained – in the sense that it provides a private cause of action with an attendant "package" of remedies and requirements – and whether resort to §1983's generic scheme would undermine §332(c)(7)'s more specific scheme. Using those criteria, the Third Circuit found that §1983 was not available. Specifically, it found that (i) a plaintiff suing under §1983 "would be freed of [§332(c)(7)'s] short 30-day limitations period and would instead presumably have four years to commence the action"; (ii) the court in a §1983 suit "would also presumably be freed of [§332(c)(7)'s] obligation to hear the claim on an expedited basis"; and (iii) "[p]erhaps most important, attorney's fees would be available" under §1983, while not under §332(c)(7). *Nextel Partners*, 286 F.3d at 695. In sum, the Third Circuit concluded that "[a]llowing plaintiffs to assert [Telecommunications Act] claims under §1983 would upset th[e] balance" – the balance, that is, of *both* benefits *and* burdens – that Congress struck when it enacted §332(c)(7). *Id.* at 694.

3. The Third and Ninth Circuits' sharply divergent approaches to *Sea Clammers*' comprehensiveness criterion may well result from loose language contained in a couple of this Court's own post-*Sea Clammers* decisions. At first blush (though, as we will show, not upon reflection, *see infra* at 10-14), language in *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987), and *Blessing v. Freestone*, 520 U.S. 329 (1997), might seem to support the Ninth Circuit's "more is better" view of comprehensiveness. In holding that the statute before it could be enforced through §1983, the Court in *Wright* observed that the statute's remedial mechanisms were not "sufficiently comprehensive *and effective*" to justify the inference that Congress sought to foreclose §1983 enforcement. 479 U.S. at 425 (emphasis added). In the same vein, the Court in *Blessing* characterized *Sea Clammers* as having involved a statute with "a panoply of enforcement options" and noted that the "enforcement arsenal" provided by the statute before it did "not compare to" those at issue in *Sea Clammers*. *Id.* at 347-48.

Smith v. Robinson, 468 U.S. 992 (1984), by contrast, clearly indicates a measure of comprehensiveness more consistent with the Third Circuit's understanding. In *Smith*, this Court faced a question similar to the one presented here. Could a plaintiff recover attorney's fees under §1983's fee-shifting provision, §1988, on an equal protection claim relating to the Education of the Handicap Act's requirement of a "free and appropriate public education"? Or, instead, was the EHA's remedial scheme, which provided for administrative and judicial review but did not authorize fee awards, exclusive of §1983. In holding that the EHA precluded resort to §1983, this Court emphasized that the EHA embodied a "carefully tailored scheme." 468 U.S. at 1012. Plainly, the Court in *Smith* did not conclude that the EHA's scheme was comprehensive in the Ninth Circuit's "more is better" sense; the whole point of the case was that §1983 permitted attorney's fees (and damage awards), while the EHA did not. *See id.* at 1009-13, 1019-20 & n.24. But the Court nonetheless *did* find that the "procedures and guarantees" set out in the EHA were "comprehensive," *id.* at 1011, and, further, that "Congress did not intend to have the EHA scheme" – including the limitations on recovery embodied in that scheme – "circumvented by resort to the more general provisions of §1983," *id.* at 1016.

* * *

This Court's review is thus triply warranted here. First, there is a clear and acknowledged circuit split concerning the specific question presented – whether 47 U.S.C. §332(c)(7) embodies a "comprehensive" remedial scheme that under *Sea Clammers* precludes resort to the more general cause of action created by §1983. Second, that split runs much deeper than the specific question presented and actually reflects a fundamental cleavage in the circuits over what it means for a remedial scheme to be "comprehensive" within the meaning of *Sea Clammers* – namely, whether a comprehensive scheme is one that maximizes a plaintiff's remedial options, or, instead, one

that is coherent, self-contained, and in some sense incompatible with §1983's remedial regime. Finally, the courts' divergent approaches to the comprehensiveness question at least arguably result from the sometimes mixed signals that this Court has sent in the wake of *Sea Clammers*. This Court should step in to bring order to this important area of the law.

II. The Ninth Circuit's Decision Is Inconsistent With *Sea Clammers*, With This Court's Decisions in Related Contexts, and With Common Sense.

The Third Circuit's approach to *Sea Clammers*' comprehensiveness criterion – namely, that a statute's remedial regime is sufficiently comprehensive to preclude resort to §1983 if it is both self-contained and materially different from §1983 – is superior to the Ninth Circuit's "more is better" approach in every relevant respect. The Ninth Circuit's decision here and the rationale that underlies it are inconsistent with (i) the decisions in *Sea Clammers* and its progeny; (ii) this Court's approach to conflicts between §1983 and other specific statutory schemes; and (iii) indeed, simple common sense.

1. *The* Sea Clammers *Cases*. The logic underlying the Ninth Circuit's specific decision concerning §332(c)(7) is inconsistent with the best understanding of this Court's decisions in *Sea Clammers* and its progeny. In concluding that §332(c)(7)'s remedial scheme is not sufficiently comprehensive to preclude resort to §1983, the Ninth Circuit focused on the limitations that §332(c)(7) places on a plaintiff's right of recovery. As an initial matter, the court emphasized that, in its view, the "only benefit to an aggrieved plaintiff" under §332(c)(7) is expedited judicial review and that the section's 30-day limitations period "imposes a burden on an aggrieved plaintiff, not a benefit." Pet. App. 8a. Further, and more tellingly, the court assumed from §332(c)(7)'s silence concerning monetary damages – and, presumably, attorney's fees, as well – that Congress intended to preserve §1983 as a

vehicle for obtaining those forms of relief. With respect to that point the court asserted that "[w]hile one may argue that the lack of any damages [remedy] in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a.

The Ninth Circuit's reasoning – that limitations on a plaintiff's right of recovery under a statute's remedial scheme render that scheme insufficiently comprehensive to preclude §1983 enforcement – cannot be squared with *Sea Clammers* or with the cases that follow it. The plaintiffs in *Sea Clammers* sued under §1983 for monetary damages stemming from violations of federal environmental statutes. By invoking §1983, the plaintiffs sought primarily to circumvent two specific restrictions embodied in those statutes: (i) a requirement that they give the defendants and the EPA 60 days notice before filing suit; and (ii) the statutes' authorization of prospective injunctive, but not monetary, relief. *See Sea Clammers*, 453 U.S. at 4, 6-7. Thus, the perceived limitations in the remedial schemes at issue in *Sea Clammers* were similar to those the Ninth Circuit found decisive here – namely, (i) the 30-day filing period and (ii) the lack of any statutory damages remedy. But while the Ninth Circuit concluded that those limitations rendered §332(c)(7)'s remedial scheme insufficiently comprehensive to preclude resort to §1983, this Court in *Sea Clammers* reached precisely the opposite conclusion. It held that the environmental statutes' remedial schemes *were* comprehensive despite the restrictions on recovery. Indeed, with respect to those restrictions, the *Sea Clammers* Court expressly emphasized that "the requirements of th[ose] enforcement procedure[s] may not be bypassed by bringing suit directly under §1983." *Id.* at 20 (internal quotation marks omitted).

Nor can the Ninth Circuit's decision here be reconciled with *Smith v. Robinson*, 468 U.S. 992. As noted above,

the plaintiffs there had sued to enforce their rights under the Education of the Handicapped Act and the Fourteenth Amendment. Because, like the §332(c)(7) here, the EHA was silent as to attorney's fees – it gave "no indication that attorney's fees [we]re available in an action to enforce [its] requirements," *id.* at 1006 – the plaintiffs in *Smith* (like the respondent, Mr. Abrams, here) sought fees under §1983's fee-shifting provision, §1988. This Court rejected that move. Despite the lack of any provision for fees in the EHA's remedial regime, this Court found that regime to be "comprehensive" and refused the plaintiffs' effort to "circumvent" the EHA's "carefully tailored scheme" by seeking fees directly through §1983. 468 U.S. at 1012. Notably for present purposes, this Court in *Smith* observed (echoing the First Circuit's decision, which it affirmed) that *Sea Clammers* supports the "general proposition that when a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme" – like the absence of any provision for the payment of attorney's fees – "should not be supplanted by the remedial apparatus of §1983." *Id.* at 1003.

Finally, neither *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), nor *Blessing v. Freestone*, 520 U.S. 329, supports the Ninth Circuit's decision. This Court found the statutes at issue in those cases insufficiently comprehensive to preclude resort to §1983 because they provided only for administrative enforcement by executive agencies (for instance, through the withholding of federal funds); none authorized a private cause of action through which an aggrieved individual himself could seek redress in court. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 427. Indeed, this Court in *Wright* distinguished *Sea Clammers* and *Smith* on the ground that the statutes at issue in those cases "themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the §1983 remedy." *Id.*; *see also id.* at 423 (*Sea Clammers* involved "scheme that

itself provided for private actions"); *id.* (*Smith* concerned remedial scheme "which itself allowed private parties to seek remedies for violating federal law"). *Wilder* and *Blessing* are to the same effect. In the former, the Court, contrasting *Sea Clammers* and *Smith*, observed that the statute before it "contain[ed] no comparable provision for private judicial or administrative enforcement," 496 U.S. at 521; in the latter, the Court likewise emphasized that "[u]nlike the federal programs at issue" in *Sea Clammers* and *Smith*, the statute before it "contain[ed] no private remedy – either judicial or administrative – through which aggrieved persons can seek redress." 520 U.S. at 348.

The remedial schemes at issue in *Wright*, *Wilder*, and *Blessing* are all fundamentally different from §332(c)(7). Whereas those cases "involved statutes that relied on executive branch enforcement with little, if any, possibility for private enforcement," §332(c)(7) *"relies entirely on private enforcement."* Jacques & Beerman, *supra* at 1, at 754 (emphasis added). Here, the Ninth Circuit itself acknowledged that §332(c)(7) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction ...." Pet. App. 5a-6a. Under this Court's decisions, that fact precludes suit under §1983; the fact that §332(c)(7)'s cause of action is in some sense circumscribed – for instance, by requiring suit within 30 days and by not providing for damage awards and attorney's fees – does not, as the Ninth Circuit assumed, detract from its comprehensiveness.

This Court's decisions – from *Sea Clammers* to *Blessing* – establish a clear rule: Where Congress goes to the trouble of expressly establishing in a substantive statute a private cause of action through which an aggrieved party can seek redress in court (as it did in *Sea Clammers* and *Smith* but did not in *Wright*, *Wilder*, or *Blessing*), the specific procedures, remedies, and restrictions prescribed by that statute govern the operation of the cause of action, and may not be

circumvented through resort to §1983's general terms. Having acknowledged that §332(c)(7) expressly provides aggrieved plaintiffs a cause of action through which to enforce their rights, the Ninth Circuit, by allowing resort to §1983, went on to sanction the very sort of end run that this Court's decisions prohibit.

2. *The* Preiser *Cases.* The Ninth Circuit's "more is better" approach is also fundamentally inconsistent with the way this Court has dealt with §1983's interaction with other federal statutes. The principle that emerges from the *Sea Clammers* line of cases – that where Congress has expressly created a private cause of action and assigned to it particular procedures, remedies, and limitations, a plaintiff cannot circumvent those specific rules through resort to §1983 – is part of a bigger picture. Under the banner that a "specific" statute should be read to govern the "general," this Court has enforced similar rules to foreclose §1983 suits in other contexts.

As noted at the outset of this brief, the most notable "intersection" that this Court has made an effort to police has been the one between §1983 and the federal habeas corpus statute, 28 U.S.C. §2254. The question in those cases has never been whether the habeas statute is sufficiently beneficial or advantageous to the complaining inmate (with the result that, if not, §1983 steps in to provide a more robust remedy). In fact, just the opposite is true. The fundamental question in that line of cases has been whether an inmate may circumvent a specific *limitation* on the habeas statute's express cause of action – typically, the requirement that he exhaust state remedies, *see* 28 U.S.C. §2254(b) – by resort to the more general, and more permissive, §1983. *See, e.g.*, *Heck*, 512 U.S. at 480-81; *Preiser*, 411 U.S. at 489-90. This Court has consistently answered no. In *Preiser*, the Court held that "[i]t would wholly frustrate explicit congressional intent to hold that [inmates] could evade [the habeas statute's] requirement[s] by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. Rather, the Court emphasized, where it "clearly

applies," the specific habeas statute – both the cause of action it authorizes and the limitations it imposes on that cause of action – "must be understood to be the exclusive remedy available ...." *Id.* at 489; *see also Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ....").

The Ninth Circuit's analysis here invites the very "frustrat[ion] of explicit congressional intent" that this Court has condemned in the *Preiser* line of cases. *See* Jacques & Beerman, *supra* at 1, at 750 (noting the similarities between §1983's interaction with §332(c)(7) and the habeas statute). Again, citing the short 30-day statute of limitations (which it called "a burden on an aggrieved plaintiff, not a benefit") and the "lack of any damages" remedy (or provision for fees), the Ninth Circuit found §332(c)(7)'s remedial scheme not to be comprehensive and, accordingly, held that §1983 must be available. Pet. App. 8a. And again, with respect to the latter issue, the court expressly assumed that the absence of any express provision in the Communications Act for damages implied *not* that Congress "intended to foreclose damages," but instead that Congress "intended to preserve an aggrieved plaintiff's right to invoke §1983." Pet. App. 7a. But that is akin to saying that because the federal habeas statute imposes an exhaustion requirement, *see* 28 U.S.C. §2254(b), or (like §332(c)(7)) does not authorize damage awards, *see Preiser*, 411 U.S. at 494, inmates must be able to invoke §1983, which entails neither limitation. This Court has squarely – and repeatedly – rejected that view. *See, e.g.*, *Heck*, 512 U.S. at 483-87; *Preiser*, 411 U.S. at 489-90. The same considerations counsel rejection of the logic underlying the Ninth Circuit's decision here.

3. *Common Sense.* Finally, and with respect, the logic underlying the Ninth Circuit's decision in this case defies common sense. Taken to its logical extreme, the Ninth Circuit's view seems to be that *any* restriction on a plaintiff's ability to recover under a substantive statute's

cause of action – whether a short limitations period, the absence of a damages remedy or fees, or some other restriction – as a basis for finding that §1983 remains available.

But by that logic, the whole *Sea Clammers* line of cases evaporates. If, as the Ninth Circuit's decision suggests, any supposed limitation in a substantive statute's remedial scheme could be bridged by resort to §1983, then *Sea Clammers* would have no independent force at all; a statute's remedial scheme would be sufficiently comprehensive to preclude resort to §1983 only when it provided the full complement of remedies (*e.g.*, injunctions, damages, fees, generous statute of limitations) that are available under §1983 – that is, *only when resort to §1983 would be wholly unnecessary and superfluous*. Like the *Preiser* rule that preceded it, the *Sea Clammers* rule has bite only when it is used to enforce – and to prevent plaintiffs from "bypass[ing]"or "circumvent[ing]" – limits embodied in substantive statutes' remedial schemes. *Smith*, 468 U.S. at 1012; *Sea Clammers*, 453 U.S. at 20. By using those same limits (here, a short statute of limitations and the absence of a damages remedy) to justify dispensing with the *Sea Clammers* rule and permitting resort to §1983, the Ninth Circuit's decision actually extinguishes the *Sea Clammers* rule altogether.

* * *

There is one final point that should be made explicit. Not only is resort to §1983 in this case inconsistent with *Sea Clammers*, but it is also unnecessary to the vindication of would-be wireless operators' rights with respect to the siting and construction of telecommunications facilities. In case after case, wireless operators have sued to enforce their rights under §332(c)(7) – and won – without relying on §1983. *See, e.g.*, *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. 2002); *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14 (1st Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403 (3d Cir. 1999); *Cellular Tele. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *see also* Jacques & Beerman, *supra* at 1, at 754 & n.102 (collecting district court cases). Further, the courts of appeals have held (to our knowledge, uniformly) that injunctive relief – specifically, an order directing the relevant state or local zoning authority to permit construction – is available under §332(c)(7). *See New Par*, 301 F.3d at 399-40; *National Tower*, 297 F.3d at 21-22; *Preferred Sites*, 296 F.3d at 1221-22; *Omnipoint*, 181 F.3d at 410; *Town of Oyster Bay*, 166 F.3d at 497.[1] Indeed, it bears emphasis that the respondent here, Mr. Abrams, prevailed on his §332(c)(7) claim in the district court, which entered a "judgment of injunction" expressly "enjoin[ing], mandat[ing] and compell[ing]" the City to "set aside its earlier resolution denying plaintiff's application" and to "adopt a new resolution granting" that application. Pet. App. 13a-14a.

If, as seems clear, wireless operators like Mr. Abrams can obtain the regulatory approvals they seek through suits for injunctive relief directly under §332(c)(7), what is fueling the recent rush to §1983? The answer seems to us plain enough, but perhaps needs to put out into the open. The answer is *attorney's fees*. Pursuant to the so-called "American rule" (*see supra* at 7), attorney's fees are not available under §332(c)(7); 42 U.S.C. §1988, by contrast, expressly authorizes fee awards in suits brought under §1983. Plaintiffs' lawyers thus have an obvious preference for §1983 over §332(c)(7), and an obvious incentive to file their §332(c)(7) suits under §1983's cover. But for two reasons, paying plaintiffs' lawyers' attorney's fees seems to us a hollow (if not perverse) reason for chucking the specific cause of action that Congress established in §332(c)(7) in favor of §1983's more liberal scheme.

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[1] The Ninth Circuit's suggestion that §332(c)(7) "contain[s] no remedies at all" and "does not provide for any type of relief" (Pet. App. 6a, 7a-8a) is thus plainly wrong.

First, as Judges Posner and Carnes have both pointed out using colorful language, the telecommunications conglomerates that are typically (though concededly not here) the plaintiffs in §332(c)(7) cases hardly fit the mold of the civil-rights victims Congress had in mind when it enacted §1988. *See PrimeCo Personal Comms. Ltd. P'ship v. City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003) (Posner, J.) (emphasizing that whereas §1988 was "enacted in recognition that civil rights suits normally pit individuals, often socially marginal, unpopular, and impecunious, against well-funded public officers in cases whose political significance may dwarf the monetary stakes," the Communications Act "creates rights in telecommunications enterprises," which "have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes"); *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1330 (11th Cir. 2000) (Carnes, J., concurring), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001) (noting that whereas "Section 1988 was intended to help the civil rights Davids of the world do battle with the governmental Goliaths," telecommunications companies' "financial self-interest and the vast sums at stake make them more than happy to serve as 'private attorneys general' to enforce the legislative measures that they have lobbied through Congress").

Second, this Court has often remarked (with regret) the tendency of attorney's-fees requests to "result in a second major litigation." *E.g.*, *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 609 (2001); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 766 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The risk of cases bogging down in disputes over fees is particularly acute in the current context given Congress' stated purpose of "encourag[ing] the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), and §332(c)(7)(v)'s express requirement that equipment-siting

disputes be resolved "expedit[iously]." Indeed, in the light of these concerns, the Eleventh Circuit has emphasized "the developing case law" holding that simple *injunctive* relief – the form of relief that the courts have uniformly held is available under §332(c)(7) itself, *see supra* at 17 – "best serves the [Communications Act's] explicit goal of expediting resolution of this type of action." *Preferred Sites*, 296 F.3d at 1222 n.13.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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